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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 01 2006

EAC 05 075 52124

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the arts. The petitioner seeks employment as an entertainer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner has not established that he qualifies for classification as an alien of exceptional ability, or that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The first issue concerns the petitioner's eligibility for the underlying immigrant classification. The petitioner describes his career as an entertainer:

> From 1993 to 1995, I was contracted with the San Church Drummers of He'nan Province. . . . I danced my way into the Grand Wind Wheel Entertainment Inc. of Zhengzhou in 1996. My experience with the drummers and Wind Wheel performers gave me chances to [meet] some very talented music lovers, three of whom, [redacted] out to be my partners in our music combo "The Happy Boys."
>
> In 1998, we set forth in the name of "Happy Boys" [redacted] to make our first appearance in the national music competitions – Open Challenge Championship of Milky Way Stars hosted by the Southeastern TV Station (SETV). I defeated all the competitors in the contest and won the Championship of the Open Challenge. . . . I signed a two-year contract with SETV in 1998 and had chances to perform in different cities. . . .

> I began to bring some traditional Chinese performing arts into my shows, which was [greeted] warmly and frantically by my fans. . . . In 2001, I went with my partners to a Chinese Central TV Gala Celebration – *Dream of Hometown, Love Over Taiwan Strait*, and our MTV song, '[redacted] was highly evaluated by the sponsors and the audience. . . . [O]ur music combo was invited to give performing tours in Thailand, Singapore, and Malaysia.
>
> When I came to the United States . . . I blended the Chinese music with the European music in my singing, and I introduced some traditional Chinese dances and martial arts into my dancing style so that my singing is always tinted with the combination of popular music and Chinese opera, and my dances can always give a vigorous and [uplifting] spirit to the audience.
>
> In April 2004, I competed in *The 11th CCTV International Singing Competition East Coast Region (USA)* and won a bronze medal. In August 2004, I took part in the *2004 8th International Chinese New Talent Singing Championship* hosted by TVB of Hong Kong and [redacted] In September 2004, I participated in the *2004 ETTV Super Idol Talent Search Contest* hosted by ETTV America and [redacted] and the prizes of [redacted] in the final held in Los Angeles. Apart from the formal competitions, I also gave a lot of performances to the young, the sick, and the senior people in different places of the United States. . . .
>
> I would like to bring what I have learned from my ancestors and instructors and give whatever arts I have created to the nice people here. I believe I can share with my audience my discoveries in Chinese, European, and American music and performing arts.

The petitioner submits copies of various Chinese-language newspaper articles. The translations that accompany these copies do not comply with 8 C.F.R. § 103.2(b)(3), which requires that the translation be certified as complete and accurate, with the translator's certification that he or she is competent to translate from the foreign language into English.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. We note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below. Qualifications possessed by all or most workers in a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example, every qualified physician has a college degree and a license or certification, but it defies logic to claim that every physician therefore shows "exceptional" traits.

The petitioner's initial submission contained no discussion of the regulatory criteria for exceptional ability. On March 9, 2005, the director issued a request for evidence, listing the regulatory criteria and informing the petitioner that he must satisfy at least three of the criteria in order to qualify for classification as an alien of

exceptional ability. The petitioner's response to the notice consists mostly of additional witness letters. The only exception addresses the first regulatory criterion relating to exceptional ability:

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.*

The petitioner submits, with a certified translation, a copy of his Certificate of Graduation from Standard Community College of He'Nan, showing that he completed a three-year program in dance in June 1996. The director determined that the petitioner has satisfied this criterion.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.*

We note the petitioner's claim to have worked with the San Church Drummers from 1993 to 1995, but the record contains no evidence from that group to show that the petitioner worked full-time with that outfit. The record shows that the petitioner was a student from September 1993 to June 1996, and graduated about eight and a half years before he filed the petition in January 2005. The reference to letters from employers shows that "experience in the occupation" is to be interpreted as employment experience, rather than some other form of experience such as training or study. The petitioner's response to the director's request for evidence does not demonstrate at least ten years of full-time employment experience as an entertainer as of the filing date.

> *A license to practice the profession or certification for a particular profession or occupation.*

The petitioner submits nothing under this criterion. It is not clear that this criterion applies to the petitioner's occupation at all.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.*

On the Form I-140 petition, under "Wages per week," the petitioner wrote "$2,000-4,000." It is not clear if this was intended to represent what the petitioner now earns, or what he seeks to earn in the future. The record contains no actual evidence of the petitioner's past or present earnings, nor any documentation to show that the petitioner earns substantially more than most others in his field.

> *Evidence of membership in professional associations.*

It is important to note, here, that simply joining an association does not increase an individual's occupational expertise. Therefore, the key factor is not whether the alien has joined associations, but what those associations require of their members. If an association requires only payment of dues, or minimal professional competency, there is nothing inherently exceptional in meeting those requirements.

The petitioner has submitted a letter from [redacted] Exchange Association,[1] who states that the beneficiary joined the association on January 1, 2005. The record does not reveal the membership requirements for this association, and therefore we cannot determine that a degree of expertise significantly above that ordinarily encountered in the field is a necessary condition for admission. It is not even clear that one need be employed as an entertainer to join the association. If membership is open to anyone with an interest in fostering cultural exchange between China and the United States, then it cannot be deemed a "professional association" by any reasonable definition of the term.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The director considered witness letters to be insufficient evidence of recognition. The record, however, indicates that the petitioner has won several awards for his artistic work. Documentation of such awards (which need not be national or international in nature) appears to satisfy this criterion in this particular proceeding; they demonstrate perhaps the most direct comparison between the petitioner and others in his field (in this case, other entrants in the competitions). Clearly, some awards carry less weight than others; for instance, the petitioner received a "best costume" award, which has little to do with the petitioner's singing and dancing abilities.

The director denied the petition, in part because the petitioner had failed to establish exceptional ability in the arts. The director found that the petitioner had satisfied only the first criterion, pertaining to education. On appeal, the petitioner argues that he satisfies all six of the exceptional ability criteria listed at 8 C.F.R. § 204.5(k)(3)(ii).

The petitioner states that he has over ten years of full-time experience because he "was a full-time entertainer" while he was studying from 1993 to 1996, and he has worked continuously since that time. The petitioner submits no first-hand evidence to support these claims. He had indicated, previously, that he has been unable to procure documentation regarding some of his early work. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The petitioner asserts that, when the Happy Boys' touring show reached Chengdu, "we were conferred the title 'Honorary Lecturer' for the Department of Music of Sichuan University." The petitioner contends that this title amounts to a license or certification under 8 C.F.R. § 204.5(k)(ii)(C). We are not persuaded by this argument, and in any event the record does not contain any evidence of the "Honorary Lecturer" title; the petitioner states that he has been unable to contact university officials for confirmation. Such a title, in any case, appears to be more akin to "recognition" than "a license or certification."

On appeal, the petitioner submits, for the first time, a copy of a "Class I Performer" certificate purportedly issued to the petitioner in 2003 by the China Acrobats Association. The petitioner did not describe himself as an acrobat when he filed the petition or when he responded to the director's request for evidence. His

[1] Elsewhere in the letter, the organization is identified as the American Chinese Cultural Exchange Association.

submission of this certificate, therefore, amounts to a revision of his claim rather than evidence in support of a previous claim.

Regarding compensation, the petitioner states that he received a salary when under contract to various entertainment organizations, and that he and his partners "paid ourselves with our own earnings" on other occasions. The petitioner does not specify the amounts paid or show that these amounts were significantly higher than most entertainers earned at that time in the countries where the petitioner performed.

The petitioner asserts that he won "humongous" sums of prize money, but prizes are not remuneration as such. We are more inclined to include prize money under the umbrella of "recognition for achievements," which, as we have noted, the petitioner satisfies.

A letter submitted on appeal indicates that KouPon Entertainment Inc. of Orlando, Florida, has offered the petitioner a position, entertaining audiences at theme parks for the "annual rate of $24,000 plus bonuses for his performance." The petitioner has not shown that is an exceptionally high level of compensation for entertainers in the United States.

The petitioner asserts that the "Happy Boys Combo became members of China Acrobatics Association in 2003 after a national artistic and music competition held in Hu Bei Province of China." The petitioner submits a copy of what purports to be a 2003 membership certificate in the China Acrobatics Association. The director had previously given the petitioner the opportunity to document his memberships in professional associations, and the petitioner at that time made no mention of the China Acrobatics Association.

The petitioner's submissions on appeal contain multiple mentions of acrobatics, which is a field that the petitioner himself never mentioned either in his initial submission, or in his response to the request for evidence. None of the newspaper articles included any discussion of acrobatics. Footage of the petitioner's performances shows the occasional dance move that borders on the acrobatic (such as spinning or balancing), but such moves make up a very small portion of the stage act. Similarly, [redacted] indicates that the petitioner broadened his act by "introduc[ing] martial arts, acrobatic[s], and some expressional physical and facial movements into the Chinese Opera," but there was no indication, prior to the appeal, that acrobatics comprised anything more than a peripheral element of the petitioner's activities on stage.

[redacted] states that he "offer[ed the petitioner] a position as a professional acrobatics performer. I gave him almost half [a] year [of] intensive and strict training such as the skills of bomerride, tumbling." [redacted] claims that the petitioner "is a famous young acrobatic performer from China." [redacted] says of his company: "We specialize in martial arts, magic shows, and acrobatic shows." When the petitioner filed the petition, he claimed exceptional ability as a singer and dancer, not as an acrobat, and the petitioner cannot overcome deficiencies in his initial filing by claiming eligibility under a different field of endeavor.

The petitioner has clearly enjoyed success in the past as a singer and dancer, but the record contains insufficient evidence to justify a finding that the petitioner qualifies as an alien of exceptional ability in the arts under section 203(b)(2) of the Act. We therefore affirm the director's finding to that effect.

The remaining issue concerns the petitioner's claim that it is in the national interest to waive the job offer requirement. The plain wording of the statute indicates that exceptional ability in the arts is not, by itself, sufficient grounds for a national interest waiver; aliens of exceptional ability in the arts are, as a rule, subject to the job offer requirement. Thus, an alien artist seeking a national interest waiver must do more than simply establish that witnesses of his or her choosing consider him or her to be highly talented. A reading of *Matter of New York State Dept. of Transportation* (throughout that decision but particularly at 217, n.3 and 221, n.7) indicates that two important factors to consider are innovation and impact – "innovation" meaning that the alien has not simply memorized and mastered an art form or technique invented by others, and "impact" meaning that the alien's work has an importance and lasting effect beyond entertaining specific audiences.

In the present instance, the petitioner has not established exceptional ability and therefore he cannot qualify for the waiver. Also, 8 C.F.R. § 204.5(k)(4)(ii) states that, to apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director noted this omission in the denial notice and the petitioner has not remedied this deficiency on appeal. Despite these procedural issues, the director considered the petitioner's waiver claim on its merits and therefore we shall do the same here.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Three witness letters accompanied the initial filing of the petition. James Lan, identifies himself as "Vice President of ETTV AMERICA New York" despite the fact that his letterhead shows a mailing address in City of Industry, California. He describes ETTV as a satellite and cable television network based in Taiwan with "the widest selection of professional-grade Chinese language channels" in North America. Mr. Lan states:

> [The petitioner] performed [with] great energy and values in transforming the traditional Chinese music into modern rock and roll style. I deeply believe that [the petitioner] will be a great asset for the United States of America. . . .
>
> In order to find more talents in the music industry, and incorporate our company into local culture, we covered a lot of special events in the great New York area. [The petitioner] has been invited to many of these events to perform his great voice and energy. He had tremendous power to express his feeling in the music and is able to communicate with the audience. His performance is always the highlight of the event and receives a lot of positive feedback from the audiences. Most important of all . . . he gives a different [perspective] of Chinese traditional music to the world. The qualities I mentioned above all set him apart from other performers, and I deeply believe that in America we definitely need such [a] person to contribute to our diverse culture.

Singer/songwriter Al Petrone states that the petitioner "is one of the most popular singers and dancers whose continued work in the United States is of great value to our nation." Most [redacted] letter consists of a history of the petitioner's career, essentially repeating the petitioner's own account. [redacted] concludes: "By any standard, [the petitioner] is an extraordinary music person. He blends the popular rock and roll with the traditional Chinese folk music and developed his unique musical technique art. I would name [the petitioner] among [the] top 20 foremost Chinese musical entertainers on the nationwide scale."[2]

The third letter is from Pamela Yuen, owner of U.S.A. Beauty School International, Inc., states:

> I first met [the petitioner] after one of his performances in China. I was blown away by his talent and unique singing and dancing style. I was amazed at how gifted he was and knew that he would have great success as a singer and dancer someday. . . .

[redacted] provides no address, telephone number, or email address, but his letter includes a handwritten postscript that reads: "Feel free to contact me on my website: www.alpetrone.com." Attempts to visit this website indicate that the site exists but, apparently, does not have any content whatsoever.

> He performed at a USA Beauty School International, Inc. Banquet dinner and was the highlight of the night.

The above witnesses clearly view the petitioner as a highly skilled entertainer, but they do not demonstrate that it is in the national interest to facilitate the petitioner's permanent residence in the United States by waiving the job offer requirement.

Photographs, videos and articles in the record indicate that, during his time in the United States prior to filing the petition, the petitioner has performed for predominantly Chinese audiences. This is not a trivial consideration if the waiver claim is based, in part, on the assertion that the petitioner provides greater exposure to Chinese culture.

The director, in a request for evidence, instructed the petitioner to submit further evidence to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*. In response, the petitioner states "my mission or career is to help more and more people in the United States, and other countries as well, understand Chinese music, arts, dances, and singing through my artistic efforts. Meanwhile, the Chinese audience also needs a chance to understand better what the real American music, dances, and singing should be." The petitioner submits several further witness letters.

Several of the witnesses attest mainly to the petitioner's earlier success in China. These letters appear to be geared more toward supporting the petitioner's exceptional ability claim than the assertion that his work in the United States merits a national interest waiver.

[redacted] identified above as president of the Chinese-American Cultural Exchange Association, states that the petitioner has introduced innovative elements into his performances; that the petitioner has performed in several major cities; and that the petitioner has participated in charity performances to benefit, for instance, victims of the catastrophic Indian Ocean tsunami of 2004.

Yeng Ji Chen is the director and president of the "Min Ensemble of Chinese American" (*sic*); the acronym for this group is, for reasons unexplained, "MOCA" rather than "MECA." This individual states:

> For more than 40 years, I have studied and worked on the development of Min Opera – a very unique Chinese art form. . . .
>
> In September 2004, when I saw [the petitioner] on the TV . . . I called [him] right away, and after a few months of conversations, I am pleased that [the petitioner] decided to be the General Advisor of Performance Arts to our ensemble in February 2005. We have given three performances in New York City and Chicago ever since, and our shows were warmly welcomed by the people of all ethnic backgrounds. . . .
>
> [The petitioner] is a very versatile artist who can understand the essence of different artistic forms fast, and he knows how to blend modern and popular artistic styles into the traditional

> forms of Chinese performing arts. From him, I seem to see a new hope in our Min Opera in the United States.

The promotion and expansion of Min Opera is clearly in the interest of those who work in that art form, but this is not the same thing as showing that the promotion of the art form is in the national interest of the United States. Many foreign-born artists and entertainers bring with them knowledge of art forms that are established traditions overseas but are little known in the United States. While the arts generally have intrinsic merit, the fact that the petitioner is one of many artists and entertainers with some expertise in what are (to many Americans) exotic art forms does not inherently qualify him for a waiver.

Magician and acrobat Peng Li states:

> I have not seen any artists like [the petitioner] who is so talented and warm-hearted at such a young age.
>
> I came to know [the petitioner] when he was performing with other contestants in the *ETTV Super Idol Music Competition*. At the time, he defeated all the contestants in the East Region of the [United] States and got ready for the final competition in Los Angeles, CA. I was deeply impressed by his great talents in performing arts as well as his intense concerns or passion for the audience and all other people.
>
> We often join together to give performances to people in such regions as New York City, Boston, Atlantic City, Los Angeles, Miami, and Washington DC, and we have a wide range of audience – people of many different ethnic backgrounds. In addition, many of our performances are of charity nature. However, each time, [the petitioner] is always the first one to put his name on the list, and very often, he sponsors the shows with his own savings.

The petitioner submits letters from officials of a Chinese-American cultural organization and a Chinese-language radio station, who assert that the petitioner has presented Chinese art forms to American audiences, but the record offers little first-hand evidence to show that the petitioner's work has attracted much attention outside of Chinese immigrant communities. As it stands, nearly all of the petitioner's witnesses are, themselves, Chinese, with the exception of one witness, [redacted] who has provided minimal information about himself and no valid means of contacting him.

The director denied the petition in part because the petitioner had not shown that his artistic work has been, or is likely to be, nationally significant on a scale that would justify the special benefit of a national interest waiver. The director found that the petitioner's "work appears to be primarily focused on the Chinese speaking community," and "[t]he record does not contain independent and impartial letters of recommendation written by experts who are well outside [the petitioner's] own circle of collaborators."

On appeal, the petitioner states: "Everything has a beginning," and he asserts that, while his early audiences were predominantly Chinese, he now plays to audiences of many ethnicities. This claim remains unsupported.

[redacted] the petitioner's martial arts instructor, and [redacted] the petitioner's vocal coach, attest to the petitioner's skill and assert that he has the potential to become a very prominent entertainer. The petitioner states that, after studying martial arts [redacted] he is "a completely different person now," and that the shows he has performed with KouPon Entertainment since August 2005 have been very popular. As noted above, KouPon officials have asserted that the petitioner works for that company as an "acrobat" and its president, Jeff Wu, has extended a job offer to the petitioner. While this job offer could potentially form the basis of an application for labor certification, and new petition grounded thereupon, the fact that the petitioner has been able to secure gainful employment as an acrobat does not demonstrate that such employment qualifies him for a national interest waiver.

Furthermore, as discussed elsewhere in this decision, the petitioner's initial claim contained minimal discussion of his acrobatic work, whereas the evidence on appeal shows that, after he filed the petition, the petitioner was hired as an acrobat. Clearly, the petitioner is a versatile entertainer who is able to adapt numerous influences into his performances. Nevertheless, he is far from unique in this respect, and the petitioner has not distinguished himself from other entertainers to such an extent that a special immigration benefit is warranted.

The petitioner has not established eligibility as an alien of exceptional ability, and therefore there is no way for him to qualify for the national interest waiver. Considered on its merits, the petitioner's national interest claim rests on little more than witness attestations regarding the petitioner's skill as a performing artist. The exact nature of the petitioner's performances appears to have evolved throughout this proceeding.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.